(3)

No. 84-1789

Office-Supreme Court, U.S.
FILED
JUN 6 1985
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH E. SIMON and
MARGARET E. SIMON,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Should this Court review the validity of a zoning ordinance as applied to property for which the property owners failed to submit an application for development under the ordinance?

2. Should this Court review the validity of a zoning ordinance where the courts below determined on a motion for summary judgment:

(a) that there was no genuine issue of fact as to whether the rezoning permitted an economically viable use, and

(b) that the rezoning substantially advanced legitimate planning and environmental interests of the City of Los Angeles?

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Respondent City of Los Angeles respectfully urges this Court to deny the Petition for Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

A. Factual Background

This is an inverse condemnation case in which petitioners Joseph E. Simon and Margaret E. Simon (hereafter "petitioners" or "property owners") seek damages for a rezoning of their property from commercial to residential use by the City of Los Angeles (hereafter "City"). Under the Los Angeles Municipal Code, the previous C2-1 zoning would have allowed, among other things, construction of no more than ten residential units. Appellate Record (hereafter "AR") Tab 13C at 226. The challenged RD2-1 rezoning on the property allows restricted density, multiple residential housing with a

gross minimum land area requirement of 2000 square feet per dwelling unit. For the 12,800 square foot parcel in question, the new zone allows as many as six residential units on the property. AR Tab 13C at 2.

The site is located next to a gas station on the south, across from a market and adjacent to single family dwellings to the northeast and northwest. AR Tab 13C at 223. The site is developed with a small commercial building which is in a state of neglect and deterioration and appears to have been abandoned for some time. AR Tab 13C at 226 and photographs at 228-229.

Petitioners' parcel is located in the Westchester-Playa del Rey District Plan (hereafter "District Plan") area

of the City of Los Angeles. The District Plan recommends residential use of the property at a density more restrictive than the RD2-1 zone adopted herein. AR Tab 13C at 220 and Tab 13D. However, after review of the detailed planning staff report on the matter (AR Tab 13C), the City Council found that RD2-1 ordinance was an appropriate mid-ground between the previous zoning and the plan designation. The compromise zoning would allow the property to serve as a buffer between commercial and single family devlopment, reducing traffic and parking impacts in the area, yet allowing a reasonable level of development at the site. AR Tab 13C at 226; Tab 3 Affidavit at 4 and 5.

The rezoning action was commenced on November 20, 1980, by motion of the Los Angeles City Council (hereafter "City Council") directing preparation of a zoning ordinance changing the zone on petitioners' property to

> ". . . a zone change corresponding to 'low-medium' residential density to permit development that is more compatible with the single-family character of the area." AR Tab 13B at 213.

The requested ordinance was prepared and set for hearing on March 2, 1981, before a Commission Hearing Examiner (hereafter "hearing examiner") who sat on behalf of the City Planning Commission (hereafter "CPC") and took written and oral testimony regarding the proposed ordinance from all interested parties,

including the property owners and their representatives. AR Tab 13A at 11-13, Tab 13B at 208-210, Tab 13C at 224-226.

The hearing examiner prepared an eight-page report (AR Tab 13C) containing his findings, his summary of the testimony, the written communications from members of the public, reports received from City Departments and photographs of the site. He recommended RD2-1 zoning for the subject property as appropriate in terms of consistency with the District Plan, compatibility with surrounding residential uses, traffic generation and parking impacts on the neighbors. AR Tab 3, Affidavit at paragraphs 9 and 10; Tab 13C at 226.

On April 2, 1981, the City Planning Commission considered the hearing examiner's report and petitioners' testimony in opposition, among other statements, and approved the zone change. AR Tab 13A at 4-175. The Planning and Environment Committee of the City Council (hereafter "Committee") considered the matter on September 1, 1981, and heard from petitioners and others on the matter. Tab 1 Exn. 1; Tab 13B at 176-218. The Committee recommended RD-2 zoning on the property, advising the City Council to adopt the ordinance in order:

> ". . . to reduce the potential high density to that which would be more compatible with the adjacent

single-family residential development and would be a step toward the density of the adopted District Plan." AR Tab 13B at 179.

On October 14, 1981, the City Council held anotner public hearing on the proposed change of zone at which petitioners, their counsel and the prospective developer of the property all appeared and voiced their opposition to the proposed action. AR Tab 1 Exh. A; Tab 13B at 181-182. The ordinance as unanimously adopted by the City Council was published on October 27, 1981 and became effective thirty days therafter. AR Tab 13B at 176. At no time since the effective date of the ordinance have petitioners submitted an application for development of the property.

B. Proceedings Below

On July 7, 1982 appellants filed a complaint in District Court alleging deprivation of property without due process of law and inverse condemnation and seeking damages against the City in the amount of one quarter of a million dollars. AR Tab 1 at 6. The complaint alleges lost profits from a prospective sale (AR Tab 1 at 4) and substantial decrease in value of petitioners' property (AR Tab 1 at 5). It does not allege denial of a reasonable or economically viable use of land. Petitioners also asserted throughout the earlier stages of this dispute that there were defects of constitutional magnitude in the notice they received of hearings before agencies of the City. AR Tab 5 at 17-18.

The City filed a motion for summary judgment which was heard by the District Court on May 16, 1983. The evidence submitted in support of the motion included files of the City Council and the Planning Commission, the report of the hearing examiner, the District Plan (AR Tab 13A-D) and an affidavit of the hearing examiner who prepared the staff work on the matter. AR Tab 3. On September 29, 1983, the District Court granted the City's Motion (Appendix C) and made Findings of Fact and Conclusions of Law (Appendix D) stating that petitioner had raised no genuine issue as to any material fact. Appendix D-17.

The property owners appealed to the United States Court of Appeals for the Ninth Circuit which issued a Memorandum Opinion of February 6, 1985 stating that the zoning ordinance did not effect a "taking," was not facially unconstitutional, and that summary judgment was appropriate on the record before the court. Appendix A-9.

Petitioners did not seek a rehearing before the Court of Appeals but rather petitioned this Court for a Writ of Certiorari. Here they have reasserted their "taking" claims but have abandoned their claims regarding defective notice.

SUMMARY OF ARGUMENT

The zoning ordinance challenged here does not constitute an unconstitutional "taking" of property. Under Agins v. City of Tiburon, 477 U.S. 255, 65 L.Ed. 106 (1980) or any other applicable precedent of this Court, the zoning ordinance in dispute does not even approach the degree of regulation which offends the Constitution.

In fact, in Agins, a regulation permitting the property owners as few as one residence on a five acre tract was held facially valid. It would necessarily follow that an ordinance allowing as many as six units for approximately a quarter of an acre is also valid.

The court below found that evidence presented by the City demonstrated the legitimate interests advanced by the ordinance (Appendix A-7-8) and that a substantial economic use of the property remains (Appendix A-8). Thus, the property owners had no cognizable claim against the City for relief of any kind.

Because the property owners had never submitted a development application under the new zoning, no evidence of the ordinance as applied was before tne court. Such a case is preculiarly appropriate for summary judgment. The face of the ordinance allows multiple residential development, and petitioners could not provide, by affidavit or otherwise, any relevant evidence that development

of six units is not an economically viable use of their property. Indeed, they did not even make allegations in their complaint to that effect.

The record on which the City relied in exercising its police power in this zoning action was in evidence before the courts below. The record established the legitimate planning and environmental interests which are substantially advanced by the zoning action.

The courts below properly applied Agins to the City's record and found no triable issues in inverse condemnation. None of the considerations of Rule 17 of the Rules of the Supreme Court governing review on certiorari provides a basis for requesting this Court to review the

same legislative record under the same legal standards. The Petition should be denied.

ARGUMENT

I

THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH APPLICABLE PRECEDENT OF THIS COURT, AND THUS NO GROUNDS EXIST FOR THIS COURT'S REVIEW.

A. Failure to Apply for a Building Permit

Petitioners do not dispute their failure to apply for a building permit under the rezoning. The District Court so found. Appendix D-9. The Court of Appeal so noted in limiting

their review to whether "the mere enactment of the zoning ordinance constituted a taking." Appendix A-6.

Petitioners do not contend otherwise. They merely assert that they "did not wish to nor could they afford to undertake the task of building on the land themselves." Petition at 19. This assertion evidences a misunderstanding of the significance of their failure to propose a specific project under the RD2-1 zone or seek relief from its restrictions by zone variance. Petitioners are not required to develop their property themselves, or at all. However, if they attack a rezoning as a "taking" of their property, they may present no evidence of how the regulation affects their

property in the absence of a specific development proposal before tne City. Like the property owners in Agins v. City of Tiburon, supra, petitioners may litigate only the facial validity of the ordinance.

> "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is yet no concrete controversy regarding the application of the specific zoning provisions (citations omitted). Thus the only question properly before us is whether the mere enactment of a zoning ordinance constitutes a taking." U.S. at 260.

Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983), (cited by petitioners as somehow supportive of their position) relies on the same proposition as stated in Agins and does not support petitioners' claim. In Martino, the court neld:

"that the failure to submit a development is not, in and of itself a bar to an attack on the ordinance 'on its face.'" 703 F.2d at 1146-47.

Petitioners are not barred from attacking the ordinance on its face. They are, however, barred from going behind the face of the ordinance to speculate on the effect RD2-1 zoning might have on the value of their property. No relevant evidence has been adduced regarding a specific project and its value, only allegations and speculations insufficient to constitute triable issues. Pellegrino v. Amercian Greetings Corp., 592 F.Supp. 459, 461 (W.D. S. Dakota 1984).

The property is still in petitioners' possession, zoned RD2-1 zoning, developable with as many as six units by petitioners or another condominium developer.

Petitioners are bound by a presumption of validity tnat attaches to the legislative acts of zoning authorities. Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 391 Ed.2d 806-807 (1974) Appendix D-13. Petitioners are also bound by the face of the RD2-1 ordinance, which expressly permits a multiple residential use, the very use petitioners wish to pursue.

B. Failure to Allege or Present Evidence On Denial of Reasonable Use

Petitioners have not even met the pleading requirements for a viable case in inverse condemnation. Their complaint alleges variously that they suffered a "decrease in market value"

and "lost the profit" to be realized from a prospective sale and have been prevented from making "full use of their property." AR Tab 1 at 4-5. No facts were alleged or supplied by affidavit in opposition to the motion for summary judgment herein regarding denial of all reasonaable use or deprivation of economic value. Throughout these proceedings, petitioners have furnished the courts nothing more than random argument that the rezoning caused them to "lose substantial profits" and deprived them of "full use of their property." AR Tab 5 at 4. Indeed, absent some unique development problems never identified by the property owners, it is inconceivable that development of six residential units on less than

thirteen thousand square feet would not be an economically viable use of petitioners' property.

II

BECAUSE NO GENUINE ISSUE OF MATERIAL FACTS COULD BE SHOWN, SUMMARY JUDGMENT WAS PROPERLY GRANTED.

A. Material Issues Under the Agins Test

Rule 56 of the Federal Rules of Civil Procedure permits summary adjudication without the burden of a trial when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Summary judgment expressly contemplates a pre-trial inquiry to separate genuine and substantial controversies from insubstantial ones. Summary judgment serves to eliminate sham issues of fact and summarily dispose of any matter which does not warrant the delay and expense of a trial. See e.g., U.S. v. Gossett, 416 F.2d 565 (9tn Cir. 1969).

In considering summary judgment of issues, tne courts should not ignore the existence of genuine issues, but neither should they strain to find them where no issues exist.

> "As a procedural matter, granting summary judgment, while a drastic remedy, is a wholesome one where applicable to the circumstances." Mintz v. Mathers Fund, 463 F.2d 495, 498 (7th Cir. 1972).

The issues in the instant case are framed by Agins v. City of Tiburon, supra. Petitioners have so conceded. AR Tab 11 at 3.

The property owners in Agins challenged the City of Tiburon's adoption of a zoning ordinance that allowed between one and five single family residences on a five acre unimproved parcel of land. This Court considered whether the mere enactment of the zoning ordinances constituted a "taking" and held that:

> "The application of a general zoning law to particular properties effects a taking if the ordinance does not substantially advance legitimate state interests (citation omitted), or denies an owner an economically viable use of his land. (Citation omitted.)" 477 U.S. at 260.

Thus the only material issues herein are those relating to the legitimacy of state interests advanced by the regulation and the denial of economically viable use of land as enunciated by the Agins test.

Three "disputed" issues are identified at pages 14-22 of the Petition as warranting grant of this Court's review. Two are not material to either prong of Agins (abandonment of use and lack of development in the area). One is not in dispute (failure to apply for a building permit, petitioners having so conceded throughout these proceedings).

Moreover, on none of the alleged "disputed" and "material" issues have petitioners come forward with anything approaching competent relevant

evidence. "When a motion for Summary Judgment is made and supported as provided in this rule [R. 56], an adverse party may not rest upon mere allegation. . . ." Pellegrino v. American Greetings, Corp., supra, 592 F.Supp. at 461.

The law is clear regarding a party's evidentiary burden in opposing a motion for summary judgment.

> "[P]laintiff has come forward with only unsupported speculation, opinion and surmise - none of which is sufficient to defeat a well-grounded motion for summary judgment." Guitar v. Westinghouse Electric Corp., 396 F.Supp. 1042, 1052 (S.D.N.Y. 1975).

B. The "Denial of an Economically Viable Use of Land" Prong of the Agins Test.

The rule is well-established and merely restated in Agins that land use regulations may reduce profits of individual property owners without offending the Constitution. If each regulation resulting in a diminution of value were a compensable taking, the land use planning process would scarcely survive.

> "By its nature, zoning 'interferes' significantly with the owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' 8 E. McQuillan, Municipal Corporations §25.44, p. 111 (3d ed. 1965). There